

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY A. WING,

Plaintiff-Appellant,

v

MASCOTECH TUBULAR PRODUCTS, INC.,

Defendant-Appellee.

UNPUBLISHED

December 20, 2002

No. 233703

WCAC

LC No. 00-000374

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals by leave granted a decision by the Worker's Compensation Appellate Commission (WCAC) shortening two of three closed awards granted by the magistrate and reversing the magistrate's grant of an open award of benefits. We reverse the WCAC's decision and reinstate the magistrate's award in its entirety.

Plaintiff began working for defendant in November 1993 as a welder. His duties were hand intensive and repetitive, and required him to lift 400 to 450 parts weighing twelve to fourteen pounds apiece during each shift. Plaintiff often worked twelve-hour shifts seven days per week. In mid-1997 plaintiff began experiencing swelling and discoloration in his upper extremities. He was given three days' leave, and upon his return to work was assigned to a job that allowed him to lift lighter parts. Plaintiff performed this job for several months without significant difficulty.

Eventually, plaintiff was assigned to a job that required him to lift 600 parts weighing seven to eight pounds apiece during twelve-hour shifts. He again developed significant bilateral upper extremity pain and swelling. He was given eight days' leave, and upon his return to work was assigned to his previous position. Plaintiff's upper extremity pain returned, and he was taken off work from August 19, 1998, through March 22, 1999. Upon his return plaintiff was assigned to a different job; however, within six weeks he developed significant bilateral upper extremity pain and swelling, and was taken off work from April 27, 1999, through February 7, 2000. Upon his return plaintiff was assigned to a janitorial position. This job was hand and arm intensive, and caused bilateral upper extremity pain and swelling. Plaintiff was off work from February 20, 2000, through June 12, 2000. When he returned to work he was given a lighter welding assignment; however, he was able to work for only eleven days. Plaintiff's last day of work for defendant was June 22, 2000.

Plaintiff sought continuing worker's compensation benefits. He testified that during the periods in which he was off work his symptoms subsided to a degree, but that each time he returned to work his tolerance level decreased. He asserted that he continued to experience pain and swelling in his forearms, and that the condition became worse with activity and at night. Plaintiff opined that he would be unable to return to work without restrictions.

The medical evidence introduced at trial via depositions and reports was contradictory. Dr. Fitzsimmons, a board-certified orthopedic surgeon and plaintiff's principal treating physician, diagnosed intermittent pain and swelling in plaintiff's upper extremities, but did not identify a specific diagnosis or underlying pathology for plaintiff's symptoms. He opined that certain of plaintiff's work activities contributed to plaintiff's symptoms, and recommended that plaintiff perform only restricted work that did not involve repetitive use of his upper extremities. Dr. Gross, a board-certified physical medicine and rehabilitation specialist, found no evidence of carpal tunnel syndrome, peripheral neuropathy, or cervical radiculopathy. Dr. Rusko, a board-certified hand surgeon, concluded that plaintiff's examination and neurological evaluation were within normal limits, and opined that plaintiff could return to work without restrictions. Dr. Hing diagnosed muscle and tendon inflammation, and opined that plaintiff's condition was attributable to his employment. Dr. Hing concluded that plaintiff should be restricted to work that did not involve repetitive use of his upper extremities.

The magistrate granted plaintiff worker's compensation benefits for the periods August 19, 1998, through March 22, 1999, April 27, 1999, through February 7, 2000, and February 20, 2000, through June 12, 2000, and continuing benefits effective June 23, 2000. The magistrate found that plaintiff suffered from a condition that, at a minimum, was aggravated by his employment at hand intensive work and that required restrictions which defendant failed to provide. The magistrate found plaintiff to be a credible witness, and found that the testimony offered by Dr. Fitzsimmons to be more credible than that offered by Dr. Russo on the ground that Dr. Fitzsimmons treated plaintiff over an extended period of time.

On appeal, the WCAC adopted the magistrate's factual analysis of the lay and medical testimony, but shortened the first and third closed award periods and reversed the open award of benefits. The WCAC agreed that plaintiff was not required to identify a specific medical condition in order to be entitled to benefits, and stated that the proofs regarding plaintiff's temporal pain and swelling established the required nexus between plaintiff's employment and his injury. Nevertheless, the WCAC found that the evidence did not establish the existence of an underlying medical pathology in plaintiff's upper extremities, but rather showed only that plaintiff's symptomatology, i.e., pain and swelling in his upper extremities, abated during periods of rest. The WCAC modified the first closed period to end on November 2, 1998, rather than on March 22, 1999, and modified the third closed period to end on April 17, 2000, rather than on June 12, 2000. The revised dates were based on notations in Dr. Fitzsimmons' records that reflected that plaintiff's symptoms had nearly disappeared on those dates. The WCAC reversed the open award of benefits on the ground that no evidence showed any duration of symptom aggravation following plaintiff's last day of work.

The WCAC does not review a magistrate's decision de novo; nevertheless, it must undertake both a qualitative and quantitative analysis of the evidence to ensure a full, thorough, and fair review. MCL 418.861a(13); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). The WCAC is required to determine whether the magistrate's

findings were supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664, 670; 620 NW2d 313 (2000). If the WCAC finds that the magistrate did not rely on competent evidence, it may then make its own independent findings of fact. However, the WCAC may not substitute its judgment for that of the magistrate if substantial evidence exists to support the magistrate's decision. *Mudel, supra* at 699-700.

Judicial review begins with the WCAC's decision, *id.* at 709, and does not extend to a review of the magistrate's decision. *Mattison, supra*. The WCAC's findings are conclusive if there is any competent evidence to support them. If it appears that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the magistrate's decision, and did not misapprehend or grossly misapply the substantial evidence standard, the judicial tendency should be to affirm the WCAC's decision. *Mudel, supra* at 702-703, 706, 709.

Plaintiff argues that the WCAC erred by shortening two of the three closed award periods and eliminating the open award. We agree, reverse the WCAC's decision, and reinstate the magistrate's award in its entirety. The WCAC agreed with defendant that no competent evidence supported the magistrate's finding that plaintiff demonstrated the existence of an underlying work-related pathology. Based on this finding, the WCAC proceeded to make independent findings of fact and concluded that plaintiff was not entitled to an open award, but was entitled to only three closed awards for the periods in which his employment aggravated his symptomatology to the point of disability. *Mattison, supra* at 671-672. However, contrary to the WCAC's conclusion, the magistrate's finding that plaintiff demonstrated the existence of an underlying work-related pathology was supported by the requisite evidence. Drs. Fitzsimmons and Hing found evidence of an underlying medical pathology, which Dr. Hing specifically diagnosed as inflammation. Dr. Hing opined that this condition was attributable to plaintiff's employment and resulted in plaintiff's disability. Plaintiff's testimony established that his underlying condition prevented him from returning to work for defendant in an unrestricted capacity. This evidence was specifically cited and relied on by the magistrate. The magistrate's grant of an open award of benefits was supported by competent, material, and substantial evidence on the whole record that demonstrated the requisite nexus between plaintiff's employment and his disability. MCL 418.861a(3); *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44, 51; 539 NW2d 382 (1995). The WCAC grossly misapplied the substantial evidence standard and impermissibly substituted its judgment for that of the magistrate. Reversal of the WCAC's decision denying plaintiff an open award is warranted under the circumstances. *Mudel, supra* at 700, 709-710.

Furthermore, we find that the WCAC erred by shortening the first and third closed award periods. An employer may reduce its liability for worker's compensation benefits by offering a disabled employee reasonable employment, i.e., employment that is within the employee's capacity to perform. If the employee refuses the offer of reasonable employment without good and reasonable cause, the employee forfeits the right to benefits during the period of such refusal. MCL 418.361a(5) and (9). On each of the three occasions on which plaintiff returned to work after being off for an extended period, defendant assigned him to a position other than his original hand intensive and strenuous welding job. The WCAC shortened the first and third closed award periods on the ground that notations in Dr. Fitzsimmons' records reflected that plaintiff's symptoms had abated by dates prior to the dates of his return to work. However, no

evidence showed that on these occasions defendant offered plaintiff reasonable employment prior to the dates on which he returned to work. The magistrate's calculation of the closed periods for which benefits were awarded was supported by the requisite evidence. MCL 418.861a(3). As a result, the WCAC was not entitled to substitute its judgment for that of the magistrate. *Mudel, supra* at 699-700.

The WCAC's decision is reversed, and the magistrate's decision is reinstated in its entirety. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald